No. 73-1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ABERDEEN AND ROCKFISH RAILROAD COMPANY, *et al.*,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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December 1974

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OPINIONS BELOW

The opinion of Judge Wright and the dissenting opinion of Judge Flannery, which are reprinted at Appendix A of the Government's jurisdictional statement,[1] are reported at 371 F. Supp. 1291. The ICC's

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[1] The United States and the Interstate Commerce Commission have appealed from the same order and decision that are the subject of this appeal. No. 73-1971. Their jurisdictional statement is hereafter cited as "Gov. J.S."

report in *Ex Parte No. 281* served on October 4, 1972, which is reprinted in pertinent part at Gov. J.S. App. D, is reported at 341 I.C.C. 290; the ICC's order served on May 7, 1973, which is reprinted at Gov. J.S. App. E, is unreported; and the ICC's final environmental impact statement is reported at 346 I.C.C. 88 (A. 10).[2]

JURISDICTION

This suit was initiated by appellee SCRAP in the District Court in May 1972, pursuant to 28 U.S.C. §§ 1336, 2321-25, to enjoin orders of the ICC. The decision and order of the District Court at issue in this appeal, which are reprinted respectively at Gov. J.S. App. A and App. D, were entered on February 19, 1974. On April 19, 1974, appellants Aberdeen and Rockfish Railroad Company, *et al.*, filed a notice of appeal to this Court, and on June 13, 1974, Mr. Chief Justice Burger extended the time to docket the appeal to and including July 2, 1974. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1253. See *Baltimore & O. R.R.* v. *United States,* 386 U.S. 372 (1967).

STATUTE INVOLVED

The statutory provision pertinent to this appeal is Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), which reads in pertinent part as follows:

"The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

* * *

[2] References to "A." are to the Appendix in this Court.

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes. . . ."

QUESTIONS PRESENTED

1. Does the District Court have jurisdiction to review general revenue orders issued by the Commission which did not determine the justness and reasonableness of any particular rates but merely terminated suspensions of carrier-made rates shortly before the conclusion of the maximum statutory suspension period?

2. Does the National Environmental Policy Act contemplate that courts will review the substantive determinations made by agencies in their environmental impact statements and, assuming *arguendo* that such review is permitted, does the District Court have any adequate basis for setting aside the ICC's extensive and detailed environmental impact statement in this case or any authority to prescribe on remand what evidence, arguments and procedures may or may not be adopted by the agency?

3. Where the sole and exclusive decision in a general revenue proceeding is reached by the Commission itself, and where the Commission has provided ample opportunity to all parties to introduce evidence and to comment upon its draft impact statement, does NEPA require still further proceedings, which cannot reasonably be expected to alter the outcome?

STATEMENT OF THE CASE

In November 1972 the Interstate Commerce Commission suspended general rate increases filed by the railroads on virtually all interstate freight traffic so far as the increases applied to recyclable commodities. The ICC then prepared a draft environmental impact statement and received comments upon it. Shortly before the end of the suspension period it

issued a final impact statement of almost 200 pages, discussing in detail each of the issues specified by the National Environmental Policy Act ("NEPA") and concluding that the increases would have no significant adverse effect on the quality of the human environment.

In the decision here on appeal, the District Court undertook to review the Commission's general revenue orders; recognizing the long-standing rule against review of such orders, the District Court by a two-to-one vote determined that NEPA cases constituted an exception to the rule. The majority then vacated the ICC's orders respecting the rate increases on recyclable commodities on the ground that the impact statement was inadequate.

A. Proceedings Prior to the Impact Statement.

In March 1972, not long after the railroads introduced a 2.5 percent temporary emergency surcharge on nearly all freight rates, they filed tariffs providing for permanent increases on almost all commodities.[3] These increases, averaging about 4 percent, were intended to supersede the flat surcharge and to offset in part enormous, recent increases in operating costs. On April 24, 1972, shortly before the new increases were to become effective, the Commission suspended the increases for the full seven-month period permitted by Section 15(7) of the Interstate Commerce Act,

[3] The 2.5 percent temporary emergency surcharge was the subject of this Court's decision in *United States* v. *SCRAP*, 412 U.S. 669 (1973). The Court there held that the District Court's July 1972 injunction against the surcharge, which had caused the railroads approximately $5.5 million in irreparable losses, was contrary to the Interstate Commerce Act and this Court's decision in *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

49 U.S.C. § 15(7), to and including November 30, 1972, and proceeded to investigate them.

The investigation, conducted primarily through written evidentiary submissions (see, *e.g.*, A. 421-565), concluded in June 1972 with an oral argument to the full Commission. On October 4, 1972, it served a lengthy report directed to the permanent increases. 341 I.C.C. 290. The report, almost 300 pages long, examined in detail the railroads' revenue needs, environmental considerations, and the application of the proposed increases to a large number of commodity groups comprising a vast number of individual commodities. The Commission determined to allow the increases to go into effect shortly before the end of the suspension period, provided that the railroads established certain limits on certain of the increases, but the Commission did not definitively determine the lawfulness of any individual rates on particular movements. 341 I.C.C. at 528-30.

The October 4 report confirmed the railroads' critical need for increased revenue. It showed that the proposed increases, even if made fully effective, would cover only about one-fourth of the $1.6 billion increase in costs which the railroads had suffered between the last general rate increase and April 1972; and the computation did not reflect additional cost increases, exceeding three-quarters of a billion dollars annually, scheduled to become effective between April 1972 and April 1973, largely as a result of new wage and tax increases.[4] The report also considered other indices of

[4] 341 I.C.C. at 297-303; affidavit of William F. Betts, Dec. 12, 1972, para. 5, submitted to the court below. The railroads have since estimated that the rate increases represent approximately $350 million annually, including $340 million on nonrecyclables and $10 million on recyclables. Betts aff'd, para. 6.

financial condition such as working capital, equipment obligations, cash flow, and rate of return. 341 I.C.C. at 303-08. For example, it found that net working capital, a key index of financial condition, had continued to decline steadily and had now approached or reached a *deficit* figure, depending on the region and method of computation. *Id.* at 304.

The report extensively discussed environmental considerations, including the limited role played by rate levels as compared with service factors and the railroads' own incentive not to apply the increases where this could result in loss of traffic. 341 I.C.C. at 322-25. It also examined the application of the increases to specific groups of recyclable commodities such as iron and steel scrap, paper scrap, textile waste, and others. *Id.* at 358-69, 392-413. It concluded that the increase would have no significant adverse effect on the quality of the environment, and for this reason the Commission did not prepare a formal environmental impact statement.[5]

The increases on nonrecyclables became effective on October 23, 1972, but the Commission's report continued the suspension on recyclables in order to receive further comments. 341 I.C.C. at 571. A number of interested parties including the Council on Environmental Quality ("CEQ") and the Environmental Pro-

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[5] Under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), it is only where such a significant impact will occur that an agency is required to prepare an environmental impact statement. Although the District Court in its July 1972 decision said that a bare finding of no impact by the agency would not satisfy this requirement, it stated that the case might appear differently "if the record revealed a detailed study by the Commission at the conclusion of which it found no significant environmental impact and, hence, no need for an impact statement." 346 F. Supp. at 201 n.17.

tection Agency ("EPA") urged the ICC to prepare a full environmental impact statement on the recyclables despite the report's conclusion that there would be no adverse environmental impact (A. 566, 572). On November 7, 1972, the Commission entered an order suspending the selective increases on recyclables for the statutory seven-month period to and including June 10, 1973, and it reopened the proceeding to consider further the environmental issues.[6]

On the same day that the Commission entered this order, SCRAP filed papers in the District Court seeking to enjoin the increases both on recyclable and nonrecyclable commodities. On January 9, 1973, the District Court denied the requested injunction. *SCRAP v. United States,* 353 F. Supp. 317 (D. D.C. 1973). It held that no injunction was required with respect to the increases on recyclables since those increases had been suspended by the November 7 order. As for the nonrecyclables, the court gave a number of reasons for denying injunctive relief: these included "the obvious fact that it is in their [the railroads'] own self interest to request and implement rate increases only where there is no reasonable prospect of diversion to other means of transport" (*id.* at 323) and "the substantial and irreparable harm to the nation's railroads that such relief would cause." *Id.* at 323-24.

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[6] What the Commission suspended was the portion of the new tariff filed by the railroads in October 1972, following the October 4 report, so far as the tariff provided for general increases on recyclables effective November 12, 1972. Since these were largely the same rates that had been suspended in April 1972, it is doubtful whether the Commission had power unilaterally to suspend the rates for an additional seven months. However, the railroads, as they have in other instances, consented to the further suspension in this case.

B. The ICC's Preparation of the Environmental Impact Statement.

Shortly after reopening the investigation in November 1972, the ICC moved to supplement the already extensive body of information concerning environmental issues that had been reflected in its October 4 report. In December 1972, it published a lengthy bibliography of articles and studies concerning recycling and related matters and it requested that interested parties supplement this list of relevant materials. A number of different parties did file responsive statements and the Commission's notice stated that a further opportunity for comment would be provided after release of a draft environmental impact statement.[7]

The Commission issued its draft impact statement on March 5, 1973 (A. 200). A number of parties submitted comments including CEQ and EPA. The comments of SCRAP, the appellee Environmental Defense Fund ("EDF"), and EPA were critical (A. 653, 633, 707); those of CEQ were somewhat more measured and concluded: "Once again, we commend the Commission for its efforts in assembling this statement and hope that the deficiencies identified by commenting parties will be carefully considered in preparing the final statement and in evaluating and selecting among possible alternative actions" (A. 706).

After reviewing comments from interested persons, the Commission on May 7, 1973, served its final environmental impact statement relating to the selective increases on recyclable commodities.[8] 346 I.C.C. 88 (A.

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[7] A copy of the bibliography is attached to the final environmental impact statement (346 I.C.C. at 239-59 (A. 161-81)) together with the supplementary list (*id.* at 259-60 (A. 181-82)).

[8] A Commission order incorporating the impact statement and discontinuing the investigation accompanied the impact statement. Gov. J.S. App. E.

10). It concluded that the increases in question would *not* have a significant adverse effect on the environment and it also concluded that any unanticipated environmental costs which might result were outweighed by the economic benefits derived from the sound rail transportation service which would be fostered by the additional revenues. *Id.* at 236-37 (A. 158-59). It based this conclusion upon 150 pages of discussion, followed by nearly 40 pages of appendix materials.

The impact statement examined the nature of the railroad rate structure and related allegations that the existing structure discriminates against recyclable commodities. 346 I.C.C. at 102-33 (A. 24-55). The Commission noted that its general revenue proceeding was not designed to prescribe individual rates and did not foreclose any shipper from obtaining relief on individual commodities in complaint proceedings under Sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§ 13, 15, and it observed that a further examination of issues involving alleged discrimination would be made in the Commission's pending general investigation into the freight rate structure, *Ex Parte No. 270. Id.* at 103 (A. 25). Nevertheless, the Commission undertook to examine the claims of discrimination relating to the existing railroad rate structure, and it found those charges to be without merit.

It concluded that the main allegations of discrimination rested essentially on surface comparisons of the rates per hundredweight or per gross ton for recyclables, such as iron and steel scrap, as compared with allegedly competing raw commodities, such as iron ore. Such comparisons, it stated, totally ignored the transportation characteristics of the different commodities and, as the proponents of the arguments

well knew, no meaningful determination of discrimination could be made from such comparisons.[9] For example, whereas iron ore moved in huge volume on a regular basis between a limited number of points, iron and steel scrap moved irregularly, in small volume shipments, between many points located over a vast area, and the costs of such scrap carriage were substantially greater. *Id.* at 117-28 (A. 39-50).[10]

Strikingly, the Commission found that while the variable cost of handling iron and steel scrap was much higher than the cost of handling iron ore, the railroads earned significantly *less* profit per ton of scrap than per ton of iron ore. 346 I.C.C. at 123-24 (A. 45-46). In addition, the Commission subsequently noted that when all of the components of finished iron and steel were considered, the rail rates for moving iron and steel scrap were *lower* than the rail rates for moving the amount of raw material including iron ore necessary to produce an equivalent amount of finished iron or steel. This existing rate advantage of scrap, from a competitive standpoint, would actually be in-

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[9] The Commission showed that it is well settled under the governing statute, judicial decisions, and agency precedents that two commodities do not receive the same rate treatment simply because their weight may be the same; rates are fixed based on a range of characteristics including, in particular, numerous factors affecting the cost of transportation of the commodity: ease of handling, regularity of movement, size of the average shipment, susceptibility of damage, and many other characteristics. *Id.* at 104-09 (A. 26-31).

[10] Based on transportation revenues, iron and steel scrap represents approximately 50 percent of the rail shipments of recyclables or as much as all other categories together. Iron and steel scrap is significant in another respect: rail transportation of this scrap is concentrated in the northeastern United States, financially the most seriously stricken of the three transportation districts.

creased by the percentage rate increases in question. *Id.* at 145-60 (A. 67-82).[11]

The Commission then turned to the question of the impact that the selective increases would have on the environment and concluded that there would be no significant adverse impact. 346 I.C.C. at 134, 147-48 (A. 56, 69-70). It based this judgment upon the history of past rate changes on recyclables, its evaluation of environmental materials listed in the bibliography and in the record, statistical data, and an elaborate category by category examination of individual recycling industries which followed. *Id.* at 134-216 (A. 56-138). In particular, the Commission pointed out that the railroads' carriage of total waste and scrap materials had increased substantially in prior years despite continuing rate increases and that the growth rate outstripped the growth of railroad traffic as a whole. For example, the volume of scrap materials increased 7.29 percent between 1968 and 1969, despite increases in both years, while total traffic increased only 0.39 percent. *Id.* at 146-47 (A. 68-69).[12]

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[11] The Commission found (*id.* at 159 (A. 81)) that "the shipping cost per ton of [iron and steel] scrap without the *Ex Parte No. 281* rate increase is $5.58, while the total transportation cost of the equivalent amount of raw materials is $8.49. With the present rate structure, it costs $2.91 less to ship scrap than the comparable raw materials. With the implementation of *Ex Parte No. 281*, the average cost of transporting 1 ton of scrap will be $5.83, and the cost of transporting the comparable raw materials $8.87. Thus, shippers would need to pay $3.04 more to transport raw materials than the corresponding amount of scrap. . . . The difference in transportation costs of raw materials and scrap will increase with *Ex Parte No. 281*, favoring scrap by an additional 13 to 16 cents."

[12] In its general discussion of environmental impact, the impact statement also examined claims that the rate increases would divert traffic to trucks. The Commission rejected the claim, declaring that apart from the impact of other factors in determining the mode of transportation, the argument ignored the swiftly rising truck rates and the readiness of railroads to hold down increases threatening diversion. *Id.* at 136-43 (A. 58-65).

The statement then examined separately particular major categories of recyclable commodities. In considering iron and steel scrap which is by far the largest category, the ICC discussed, *inter alia,* the nature of the steel-making industry, steel technology, and the scrap industry structure and its technology; demand and pricing patterns for iron and steel scrap; comparative rail rates of scrap and raw materials; and many similar factors. 346 I.C.C. at 148-60 (A. 70-82). The Commission noted, for example, that despite changes in price, the amount of scrap used in the total furnace charge by the steel industry has remained constant for almost 30 years (*id.* at 149 (A. 71)); that identifiable bottlenecks in the processing of iron and steel scrap have nothing to do with rates (*id.* at 150 (A. 72)); and the scrap, as noted earlier, enjoys an *advantage* vis-a-vis raw materials which will be increased by the rate increases in question (*id.* at 159 (A. 81)). The high-cost characteristics of transporting scrap had been discussed earlier. *Id.* at 119-28 (A. 41-50).[13]

The impact statement went on to discuss separately paper scrap (*id.* at 160-76 (A. 82-98)); textile wastes (*id.* at 177-82 (A. 99-104)); petroleum refining waste and waste sulfides (*id.* at 182-85 (A. 104-07)); scrap glass (*id.* at 186-95 (A. 108-17)); nonferrous metal scrap (*id.* at 196-201 (A. 118-23)); plastic scrap (*id.*

[13] The views expressed by the Commission were, in fact, wholly consistent with affidavits of steel companies themselves which the railroads introduced in the District Court in opposition to the requested injunction. See p. 16, below. These affidavits confirm that the mix of raw ore and scrap used by the steel industry is determined essentially by technological factors and demand for the finished product and has virtually nothing to do with freight rates. These affidavits were furnished by companies which, obviously, have no interest in seeing higher freight rates on the products they utilize.

at 202-09 (A. 124-31)); fly ash and other industrial ashes (*id.* at 209-15 (A. 131-37)). In each instance, the Commission examined the record evidence and the allegations of the parties urging exemption of recyclables from the rate increases and it found that the evidence did not justify the conclusion that the increases would have any significant impact on the movement of recyclables.[14]

In addition, the Commission considered the adverse effects of *not* having the increases in question. It stated that "the railroads require these increases to continue to operate in an economic and efficient manner. Failure to approve these increases would endanger the continued existence of the railroads, and, accordingly, would have a far greater potential adverse effect upon the quality of our environment than any minor diversion from rail carriage that may occur now." *Id.* at 217 (A. 139).[15] The ICC also considered alternatives to the proposed rate increases including the further extension of multiple car rates on scrap, hold-downs of increases on recyclable commodities, subsidies to carriers and similar alternatives. *Id.* at 218-35 (A. 140-57).

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[14] A typical example was textile waste. The Commission found that the difficulties of that industry were due basically to technological and marketing problems, including the increased use of synthetics, that would be unaffected by rate changes; that in a number of instances the rates on textile waste did not even cover the costs of handling the traffic; and that the claims of the proponents of exemption were based on infirm data. *Id.* at 177-82 (A. 99-104).

[15] Earlier, the Commission had noted that the ability of the railroads to carry freight at all including recyclables and the ability to fund their own increasingly expensive environmental programs would be adversely affected in the absence of rate increases. *Id.* at 134-36 (A. 56-58).

C. Court Proceedings Following the Impact Statement.

The final impact statement was served by the Commission on May 7, 1973. Then, on May 30, only eight days before the impact statement's effective date, SCRAP and EDF filed a short motion in the District Court for a preliminary injunction against the new increases on recyclables which the railroads intended to make effective at the end of the suspension period on June 10, 1973. On June 7, 1973, the day the Commission had contemplated that its final impact statement would become effective, the District Court enjoined the Commission and the railroads from collecting the proposed increases on recyclables "until further order of this court." Order of June 7, 1973. The four-paragraph injunctive order contained conclusory assertions that the plaintiffs had established the requisites for preliminary relief and stated, inaccurately and without explanation, that injunctive relief "will not substantially harm the railroads." *Id.*[16]

On June 8, 1973, Mr. Chief Justice Burger granted a stay of the injunction.[17] Thereafter, the increases on recyclables were placed in effect and continue in effect today. On November 19, 1973, this Court for the second time in the course of this litigation overturned the judgment of the District Court, and it remanded the case for further consideration in light of *Atchison,*

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[16] The general increases on recyclables in fact represent approximately $10 million per year in increased revenues. Affidavit of William F. Betts, June 6, 1973, para. 2, submitted in this Court in connection with the railroads' application for a stay of the District Court's preliminary injunction of June 7, 1973.

[17] SCRAP, EDF, and one of the trade associations subsequently filed applications with the full Court to vacate the stay issued by the Chief Justice. On June 25, 1973, this Court denied the application to vacate the stay. 413 U.S. 917.

T. & S.F. Ry. v. *Wichita Board of Trade,* 412 U.S. 800 (1973). 414 U.S. 1035-36.

While the appeal of the District Court's preliminary injunction was pending before this Court, the appellees filed motions for summary judgment in the District Court seeking two principal forms of relief:[18] first, a declaration that the ICC's general revenue orders were unlawful because the environmental impact statement in *Ex Parte No. 281* was inadequate; and second, permanent injunctive relief forbidding the railroads from collecting the permanent rate increases on recyclables which were the subject of *Ex Parte No. 281* or from collecting any further rate increases on recyclables obtained in any subsequent proceeding.

In response, the railroads filed a memorandum and numerous supporting affidavits.[19] The affidavits established the substantial and irreparable losses totalling $10 million per year that an injunction against rate increases on recyclables would cause the railroad industry; the readily identifiable cost increases, greatly in excess of additional revenues, the railroads continued to suffer; and the extremely serious condition of

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[18] In addition to SCRAP, which filed a motion for summary judgment below, the following intervenors also filed such motions: the EDF and two associated organizations, the National Parks and Conservation Association and Izaak Walton League of America; the National Association of Recycling Industries, Inc., ("NARI") and three of its members; and the Institute of Scrap Iron and Steel, Inc. ("ISIS") and one of its members.

[19] Included among these were an affidavit from Mr. Betts, Vice President for Economics and Finance of the Association of American Railroads; affidavits from railroad experts in the transportation of ferrous scrap and nonferrous metal scrap, paper scrap and textile waste, rubber scrap, plastic scrap and chemical wastes, and glass scrap; affidavits from two major steel companies, Bethlehem and National; and affidavits of seventeen individual railroads.

the railroad industry exemplified by major railroad bankruptcies throughout the East and the threat of further bankruptcies elsewhere.[20]

The affidavits also demonstrated that any significant reduction in the railroads' revenues would, in light of their present financial state, be translated directly into poorer service for the public.[21] Furthermore, the affidavits showed that an injunction would have had an immediate and adverse impact on the environment as well as rail transportation service generally. Reduced service, decreased car supply, and deteriorating plant impair the railroads' ability to transport all commodities (*e.g.*, Lehigh Valley aff'd, para. 5; MKT aff'd, p. 4), and bear with particular force on recyclable materials because many of them cannot feasibly be moved unless they are moved by rail. See, *e.g.*, Betts aff'd, para. 9.[22]

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[20] The serious financial plight of the railroads was confirmed by virtually all of the railroad affidavits. See, *e.g.*, Central of New Jersey aff'd, paras. 2-5; Rock Island aff'd, pp. 2-3. In several cases, including the Penn Central and Reading, railroads currently in reorganization were now confronted with serious shortages of cash necessary simply to maintain operations.

[21] They showed, for example, that the loss of the $10 million in annual revenues here in question would mean that maintenance would have to be reduced, new cars could not be financed, and the railroads' physical plant including track would deteriorate even further, causing still more serious transportation problems in the future. *E.g.*, Burlington Northern aff'd, paras. 5, 16; Milwaukee aff'd, para. 16.

[22] In addition, the railroads' own environmental programs, which now cost approximately $100 million per year to maintain at their current level, would be adversely affected by the injunction (Betts aff'd, para. 10), including major expenditures for diesel emission control; roadside fire control; weed and brush control; pollution control at maintenance shops; separation of oil from drainage; and elimination of stationary stack emissions. See, *e.g.*, Illinois Central Gulf aff'd, p. 7; Southern Pacific aff'd, paras. 17-18.

In addition, consistently with the impact statement's conclusions, the affidavits showed that the increases here at issue would not discourage the movement of recyclable commodities or result in their diversion to trucks. This was established by the railroads' own past experience (*e.g.*, Southern aff'd, pp. 4-5); their experience with the increases involved in this case (*e.g.*, Reading aff'd, para. 7); and experts familiar with individual commodities.[23] Finally, the affidavits demonstrated that rail rate charges are carefully calculated to avoid increases which would risk a loss of traffic and thereby defeat the purpose of the increases. See, *e.g.*, N&W aff'd, para. 5.[24]

On February 19, 1974, the District Court, by a two-to-one decision, vacated the Commission's orders respecting the rate increases on recyclable commodities and remanded the case to the Commission for further proceedings with respect to the environmental issues involved. 371 F. Supp. 1291 (Gov. J.S. 1a). Judge Wright's opinion concluded that NEPA challenges to general revenue orders were an exception to the previous rule that such orders were not reviewable at this stage. 371 F. Supp. at 1296-98 (Gov. J.S. 17a-

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[23] Notably, a graph comparing rail rate increases on ferrous scrap during the past five years and figures showing the actual tonnage of such scrap moved by the Penn Central in this period vividly demonstrated that there is *no correlation* between the two. See Scanlan aff'd, ex. 1.

[24] Where general increases may threaten to discourage or divert traffic because of local circumstances, the railroads meet the problem by applying individual hold-downs limiting or rendering inapplicable rate increases for particular movements. See, *e.g.*, Lehigh Valley aff'd, para. 6.

20a). The opinion then criticized and condemned the views expressed in the impact statement.[25]

In dissent, Judge Flannery, following the reasoning of this Court in *SCRAP*, concluded that "there is no indication that Congress intended N.E.P.A. to overrule the long line of judicial decisions holding that general revenue orders, such as those presented in this case, are not reviewable by the courts." 371 F. Supp. at 1311 (Gov. J.S. 53a). Alternatively, he concluded that the impact statement "clearly [represented] the 'hard look'" at environmental consequences mandated by NEPA and that further proceedings were a largely "ritualistic act." *Id.* at 1312 (Gov. J.S. 55a).

SUMMARY OF ARGUMENT

The lower court's assertion of jurisdiction is contrary to the long-standing rule against review of general revenue orders of the Commission. The lower court's claim that there is a "NEPA exception" to this rule is directly inconsistent with this Court's decision in *SCRAP* that NEPA was not intended to alter pre-existing jurisdictional rules. 412 U.S. at 692-98. The lower court's attempted justification for its proposed NEPA exception is unpersuasive and, ironically, rests largely on a constricted view of standing of environmental groups which both the lower court and this Court specifically rejected in *SCRAP*.

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[25] The court refrained, however, in light of this Court's decision in *Wichita Board of Trade*, from enjoining the railroads from collecting the increased rates on recyclables pending the Commission's reconsideration. None of the plaintiffs in the District Court has appealed from the denial of the injunction.

The lower court's expression of doubt about the continued viability of the general rule against review is unsound. In a closely analogous case, this Court only a few years ago unanimously reaffirmed the general rule at least so far as it applies to attacks on general revenue orders which, like the attack here, are directed to particular rate categories as opposed to general revenue findings. *Electronics Industries Ass'n* v. *United States,* 401 U.S. 967 (1971), *aff'g* 310 F. Supp. 1286 (D.D.C. 1970). The general rule is, moreover, entirely sound both on policy and precedential grounds.

If this Court does reach the merits, it should reverse the lower court's decision that the impact statement in this case is inadequate. The Commission's detailed impact statement of almost 200 pages gave careful consideration to each of the major arguments made by those urging an exemption of recyclables from rate increases borne by all other products; it treated each category of recyclables in depth; and it specifically concluded that the rate increases here in question—applicable to alleged competing products as well as to recyclables—would not adversely affect the environment.

The individual criticisms of the impact statement made by the lower court are, for the most part, disagreements with the Commission's appraisal of the evidence, its choice of analytical methods, and its policy judgments. Nothing in NEPA contemplates substantive judicial review of this type which would disrupt both the courts and the agencies. Moreover, the lower court's substantive criticisms are based on misunderstandings of what the Commission actually found and what NEPA requires.

Finally, the lower court's "procedural" objections are equally without merit. Its attack on the Commission's failure to revise its October 4th report in light of the impact statement makes no sense, since the impact statement confirmed the environmental determinations made in the earlier report and required no alteration of any other conclusions. The lower court's subsidiary ruling that further hearings should be held, despite the opportunity afforded to all parties to offer environmental evidence and to comment on the draft impact statement, finds no support in NEPA or the precedents and would represent a pointless ritual productive of nothing but further delay.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE COMMISSION'S GENERAL REVENUE ORDERS.

The lower court's decision rests upon the mistaken premise that there is a "NEPA exception" which allows it to review general revenue orders that would not otherwise be reviewable. This position is contrary to this Court's decision in *SCRAP* and is unsupported by persuasive reasoning. The general rule precluding review of general revenue orders at this stage, so far as it applies to attacks on particular commodity groups, was unanimously sustained by this Court and is entirely sound.

A. The Long-Standing Rule Establishing the Unreviewability of General Revenue Orders, Which Are Merely an Interim Stage in the Rate-Making Process, Precludes Judicial Review of the Commission's Orders in This Case.

As its opinion in this case shows (see 371 F. Supp. at 1310 (Gov. J.S. 50a)), the lower court's decision was directed specifically against two orders of the

ICC entered in a general revenue proceeding and a related environmental impact statement: one order implemented the Commission's report of October 4, 1972, and the other order, served on May 7, 1973, adopted the final impact statement and terminated the reopened proceeding. The lower court's authority to review the impact statement depends, of course, on its authority to review the ICC orders themselves.[26]

Each of these orders reviewed by the lower court terminated the suspension of the rates shortly in advance of the end of the seven-month period, and, if neither order had been issued, the rates would still have become effective by operation of law at the end of the period. In neither order did the ICC make any definitive finding that the particular rates at issue were just and reasonable, and neither order cut off the rights of any interested party to file a complaint with the Commission to establish that particular rates are unlawful.[27] Instead, the ICC's determinations were typical of general revenue proceedings, for they represented only initial judgments about broad rate

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[26] The lower court is a statutory three-judge court empowered to review ICC "orders" (28 U.S.C. §§ 1336(a), 2321-25), and the decision below explicitly recognized that the District Court's authority to review the ICC orders presented a threshold jurisdictional problem. 371 F. Supp. at 1296-98 (Gov. J.S. 14a).

[27] The ICC emphasized this in its impact statement, explaining: "Thus, we do not attempt to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does the order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370. If individual rates or groups of rates are believed to be unjust and unreasonable, a shipper or other interested persons has an administrative remedy available in sections 13 and 15 of the Interstate Commerce Act, 49 U.S.C. §§ 13 and 15." 346 I.C.C. at 103 (A. 25).

categories based principally upon an appraisal of railroad revenue needs.[28]

Because they do not foreclose shipper remedies or determine finally the lawfulness of any individual rate, general revenue orders are comparable to suspension orders directed to particular rates; and their basic function—as this case demonstrates—is to fix the duration of a suspension involving numerous rates, just as a conventional suspension order operates upon an individual rate.[29] Such orders thus represent only an interim stage in the rate-making process; any rate which has been raised as a result of a general increase proceeding may be challenged subsequently in a complaint case by any interested party on any ground that would ordinarily be available. This is true of all rates involved in the present case including rates on recyclable commodities.

For almost 40 years it has been the settled rule in the lower courts that general revenue orders, like suspension orders directed to individual rates, are not reviewable.[30] The rule, as the cases disclose, is

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[28] See *United States* v. *SCRAP*, *supra*, 412 U.S. at 692 n.16; *New England Divisions Case*, 261 U.S. 184, 196-197 (1923); *United States* v. *Louisiana*, 290 U.S. 70, 76-77 (1933).

[29] The present case is thus quite unlike *Wichita* where the Commission had held definitively that the particular rates there at issue were just and reasonable. In fact, this Court in *Wichita* contrasted the order there involved with general revenue orders, observing that if the grain charge "were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." 412 U.S. at 814 n.10.

[30] See, *e.g.*, *Algoma Coke & Coal Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd mem.*, 352 U.S.

based upon sound policy considerations including an unwillingness of courts to interfere at what is merely an intermediate stage in the rate-making process, the availability of further remedies focusing upon individual rates, and the dangers of disruption and inconsistency that would result from review of general revenue orders. See pp. 32-33, below.

The rule is not only one of long standing but it was only recently reaffirmed by two three-judge panels in the lower court and a three-judge panel in the Southern District of New York (see p. 23, n.30 above),[31] and, in the instance most closely analogous to the present case, this Court unanimously affirmed the District Court. See pp. 30-32, below. Indeed, while the lower court expressed its disapproval of the rule, it nevertheless recognized its existence and for this reason explicitly rested its holding that it had jurisdiction on a supposed exception to the general rule, to which we now turn.

B. NEPA Does Not Create An Exception to the Rule That General Revenue Orders Are Unreviewable.

While recognizing the well-settled principle that general revenue orders are unreviewable, the lower court sought to avoid its thrust by contending that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority

1021 (1957); *Atlantic City Elec. Co.* v. *United States*, 306 F. Supp. 338 (S.D.N.Y. 1969), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969), *both aff'd by an equally divided Court*, 400 U.S. 73 (1970); *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D. D.C. 1970), *aff'd mem.*, 401 U.S. 967 (1971).

[31] Of the nine judges involved, there was only one dissent—that of Judge Wright in the *Alabama Power* case, 316 F. Supp. at 339.

granted us." 371 F. Supp. at 1298 (Gov. J.S. 20a) (emphasis added). The lower court thus demonstrated an utter disregard for this Court's opinion in *United States* v. *SCRAP, supra,* which flatly rejected the argument that NEPA effected any change in pre-existing jurisdictional rules. In addition, even if the issue remains open to debate after *SCRAP,* it failed to provide any logical or persuasive reasons for finding in NEPA a basis for a jurisdictional exception.

The supposed NEPA "exception" perceived by the lower court is nothing other than a slight variation on a theme which the lower court adopted in the original *SCRAP* litigation and which this Court specifically rejected. There, the lower court, although conceding that *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658 (1963), established a general rule against judicial intervention at the suspension stage, concluded that "NEPA implicitly confers authority" to grant such relief against any federal action "even if jurisdiction to review this action is otherwise lacking." 346 F. Supp. at 197.

On review in *SCRAP,* this Court unambiguously rejected the notion that NEPA *sub silentio* creates new jurisdictional standards affecting judicial review of ICC action. 412 U.S. at 692-98. This Court made it crystal clear that NEPA did not contemplate or justify any "wholesale overruling of prior law." 412 U.S. at 694. Yet, all of the lower court's arguments as to why a NEPA exception should be carved out of settled legal doctrine are based on an express assumption—that "*the existence of NEPA* requires us to reconsider the application of these doctrines and *in NEPA cases* to accept more of the broad jurisdictional authority granted us" (371 F. Supp. at 1298

(Gov. J.S. 20a) (emphasis added))—which flies in the face of this Court's opinion in *SCRAP*.

While the lower court claimed that this Court's analysis in *SCRAP* was narrowly confined to statutory limitations on the district courts' jurisdiction (371 F. Supp. at 1298 (Gov. J.S. 20a)), the broad language of the *SCRAP* opinion hardly lends itself to such a crabbed interpretation. *SCRAP* emphasized that nothing in NEPA or its legislative history reflected any congressional intent to alter the rule that courts may not "suspend" rates by injunction when the Commission has chosen not to do so or when the statutory suspension period has expired. 412 U.S. at 694-95. Similarly, nothing in NEPA or its legislative history bespeaks any intention to overturn the settled rule against judicial review either of suspension orders directed to individual rates or of general revenue orders directed to rates as a whole.

Finally, the Court in *SCRAP* stressed that the policies underlying the *Arrow* doctrine had the same application to NEPA cases as to cases involving more familiar types of attacks on railroad rates. 412 U.S. at 696-98. Here, it is no less true that the policies underlying the rule that general revenue orders are unreviewable apply to NEPA cases just as they apply to efforts to review general revenue orders on conventional grounds. See pp. 32-33, below. Indeed, the rule of unreviewability is itself closely related to the *Arrow* doctrine which this Court found to be unimpaired by NEPA.[32]

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[32] In *Arrow*, this Court in explaining why injunctive relief was precluded stated that "the same considerations" explained why the courts declined to review suspension orders and cited the leading cases on point. 372 U.S. at 670 & n.21. The principles underlying nonreviewability of suspension orders applicable to individual rates and general revenue orders applicable to all rates are the same.

The applicability of the general rule against reviewability is underscored by the attempts of the lower court to distinguish it. The court below gave two reasons for carving a "NEPA exception" out of the established rule that general revenue orders are unreviewable. Neither is persuasive.

First, the court argued that because "it is least questionable that environmental groups such as SCRAP have standing to initiate Section 13 proceedings during which they could attempt to contest the Commission's compliance with NEPA" (371 F. Supp. at 1297 (Gov. J.S. 17a)), such groups should "therefore" be able to challenge the Commission's general revenue orders. Since *SCRAP,* however, there is no reason to doubt that environmental groups such as SCRAP have standing to initiate Section 13 proceedings. As this Court held in *SCRAP,* Section 10 of the APA confers standing upon those who can show "that the challenged action had caused them 'injury in fact' where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." 412 U.S. at 686, quoting *Sierra Club* v. *Morton,* 405 U.S. 727, 733 (1972). Here, as in *SCRAP,* it is not disputed that the "environmental interest" that the appellees claim to protect is within the zone of protected interests (412 U.S. at 686 n.13) and, as for injury in fact, *SCRAP* held that appellees' allegations were adequate to confer standing to complain of rate increases on recyclables (*id.* at 690).[33]

[33] Although the lower court characterizes this conclusion as "speculative" and "unrealistic," (371 F. Supp. at 1297 (Gov. J.S. 17a)), it gives no reason for supposing that the standing of environmental groups established in *SCRAP* is any less secure

Even assuming that the lower court was correct in its contention that environmental groups may lack standing to challenge the Commission's action in a Section 13 proceeding, it does not follow that NEPA creates an exception to the principle that general revenue orders are not subject to judicial review. Rather, if standing is lacking in Section 13 proceedings, the logical implication would be that environmental groups are equally lacking in standing to challenge general revenue orders. There is nothing in the *Sierra Club* or *SCRAP* decisions to suggest that the criteria for standing to challenge agency action under NEPA differ according to whether a general revenue order or a specific tariff is under attack.[34]

Second, the lower court in creating a "NEPA exception" relied upon the purported inadequacy of a Section 13 proceeding to achieve the purposes of NEPA. The court first argued that unless review of the Commission's general revenue orders were permitted, it would not be possible "to consider whether the rate increases on recyclables collectively have a significant environmental impact." 371 F. Supp. at 1297 (Gov. J.S. 18a).[35] However, quite plainly it is only

when the environmental claims are directed to particular rates on recyclables rather than to recyclables rates *en masse*. Indeed, if there were any proceeding in which environmental groups might purport to show environmental injury in fact, it would be in Section 13 proceedings focusing upon particular rates.

[34] It is certainly far more logical to conclude that standing in a general revenue proceeding implies standing in a Section 13 proceeding than to argue that a lack of standing in a Section 13 proceeding should be remedied by altering a long-standing rule involving *reviewability* of general revenue orders.

[35] Complaint proceedings under Sections 13 and 15 may, of course, consider a substantial number of rates in a given area in a single proceeding. See, *e.g.*, *Institute of Scrap Iron & Steel* v. *Akron, C. & Y.R.R.*, 316 I.C.C. 55 (1962).

by first considering whether particular rates on particular recyclable commodities will have an impact on the environment that one can even approach the question whether all the rates, considered as a whole, will have such an effect.[36]

The lower court further contended that even if a Section 13 proceeding could resolve NEPA claims, the investigation into rates on individual commodities would produce "burdensome relitigation of each particular rate" causing a delay in the ultimate resolution of the environmental issues with the possibility that irreparable damage would be done to the environment in the interim. 371 F. Supp. at 1298 (Gov. J.S. 19a). On the contrary, since a general revenue proceeding is only an intermediate stage in the rate-making process which does not determine the justness or reasonableness of any particular rate, it is impossible to reach any definitive conclusion in that proceeding on what rate levels should be.[37] Judicial review at this stage of the rate-making process merely serves to postpone the inquiry into particular rates and thus delay the final determination whether such rates are in fact just and reasonable, taking into account all factors including environmental ones.

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[36] Not only did the ICC give separate treatment in its impact statement to individual commodities and commodity groups, but the lower court itself—in specifying the additional studies it deemed necessary—stressed that they should be done on a commodity by commodity basis. *E.g.*, 371 F. Supp. at 1303 (Gov. J.S. 32a).

[37] Just as a complainant is free to begin a Section 13 proceeding if rates are raised in a general revenue proceeding, so the carrier is free to file individual rate increases on those commodities following the general revenue proceeding where increases were not instituted.

C. The Well Settled Rule That General Revenue Orders Are Unreviewable Is Sound and Where As Here No Challenge Is Made to the Railroads' Revenue Needs, the Rule Has Been Unanimously Sustained by This Court.

As noted above, for almost four decades it has been well established in the lower federal courts that general revenue orders are not reviewable. For this reason the court below explicitly rested its decision on a supposed "NEPA exception" to the settled rule. Nevertheless, Judge Wright took some pains to express his disagreement with the prevailing rule (371 F. Supp. at 1296-97 (Gov. J.S. 15a-19a)), reiterating views expressed in his dissent in *Alabama Power Co.* v. *United States, supra,* 316 F. Supp. at 339-40.

Just four Terms ago, this Court left standing three lower court decisions which reaffirmed the rule that general revenue orders are unreviewable. In *Atlantic City Electric Co.* v. *United States,* 306 F. Supp. 338 (S.D.N.Y. 1969) and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C. 1969), the Court divided evenly in sustaining the lower courts' dismissal of such suits. 400 U.S. 73 (1970). More importantly, later in the same Term that *Atlantic City* and *Alabama Power* were decided, the Court unanimously affirmed a similar decision of the District Court in *Electronic Industries Ass'n* v. *United States,* 310 F. Supp. 1286 (D.D.C. 1970), *aff'd mem.,* 401 U.S. 967 (1971). The difference between the decisions is significant here because the present case is squarely governed by *Electronic Industries.*

In the first two cases, the attacks were directed at the ICC's findings relating to railroad revenue needs, findings which had no relationship to particular types of rates and which in fact cut across all rate categories.

In the *Electronic Industries* case, however, the attack was directed not to revenue-need findings but to the application of the general increase to particular categories of rates.[38] This is precisely the situation in the instant case: Here, the appellees' claims concern the Commission's treatment of particular categories of rates applicable to recyclable commodities, just as the claims in *Electronic Industries* concerned the Commission's treatment of categories of rates applicable to electrical products.

As the District Court in *Electronic Industries* reasoned:

> "[T]he plaintiff's whole complaint boils down to an assertion that the increase in rates for shipping electrical products is discriminatorily high and without a rational cost basis. Its claim is clearly a subject for §§ 13 and 15 of 49 U.S.C. Thus, plaintiff's attack here is premature; it must first exhaust its appropriate administrative remedies." 310 F. Supp. at 1289.

The statement is equally applicable to the increases in rates on recyclables here at issue. Since this Court unanimously affirmed the District Court's decision in *Electronic Industries,* which presented a situation similar to the instant case, it is apparent that there can be no review of the Commission's orders in this case.

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[38] It seems apparent that this distinction between *Alabama Power* and *Atlantic City* on the one hand and *Electronic Industries* on the other explains the Court's unanimous affirmance in the latter case. Thus, the United States and the Commission, although in disagreement about other aspects of the earlier two cases, both agreed that attacks on general revenue orders were not reviewable insofar as they challenged the Commission's treatment of the rates on particular commodities and that *Electronic Industries* was governed by this principle.

The lower court attempted to avoid the force of this Court's unanimous affirmance in *Electronic Industries* by contending that the shippers there attacked "only that portion of a Commission § 15(7) order permitting increased rates on two particular items" (371 F. Supp. at 1297 n.18 (Gov. J.S. 16a n.18)). The suggested distinction is without substance. In fact, as indicated above, the shippers in *Electronic Industries* were attacking increases in rate categories in which they were interested, namely, rates on radio and television sets and electronic components or accessories, just as appellees here are attacking increases in rate categories in which they are interested, namely, various recyclable commodities such as iron and steel scrap, scrap glass, and textile scrap.[39]

Electronic Industries, we submit, is dispositive of this case and makes it unnecessary for the Court to consider here the different question raised by *Atlantic City* and *Alabama Power*—whether the general rule against reviewability should continue to apply to attacks on general revenue findings, findings which have no relationship to particular rate categories. If, however, the Court does not agree, then we believe the general rule should itself be reaffirmed. Indeed, consideration of the main reasons for the general rule reinforces the railroads' basic jurisdictional argument in this case.

The central point is that ultimately no one—shipper or environmentalist—has any right to have rates charged below a just and reasonable level, and there can be no resolution of this issue short of a proceeding

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[39] Rates on electronic components and radio and television sets are, like rates on scrap iron or glass, broad categories encompassing many different rates between different points.

such as a Section 13 case in which the rates on particular commodities between specific points are finally set, in light of all relevant considerations including environmental considerations. To allow review of general revenue orders is thus scarcely different than allowing review of ordinary suspension orders or any other interlocutory orders entered in ICC proceedings. Such review violates settled principles of exhaustion of remedies and finality; it multiplies litigation in the courts to no purpose; it delays final resolution of the ultimate question of justness and reasonableness; and it presents the same risk of premature impact upon and influence of the administrative process deprecated by this Court in *Wichita*.

In addition, a decision permitting review of general revenue orders would have a devastating effect upon the railroads. If shippers, environmentalists and other interested parties were routinely to seek judicial review of the Commission's general revenue orders, they would certainly seek to prevent the implementation of the railroad rates in issue. The railroads would thus be confronted with the threat of injunctions from district courts in different parts of the country preventing them from collecting rates at different intermediate stages of the rate-making process—a prospect that would seriously aggravate their already precarious financial situation.

Finally, the rule that general revenue orders are unreviewable is one of long standing which has been left untouched by Congress in major revisions of the Interstate Commerce Act. The rule is closely allied to the settled principle, emphasized in *Arrow* and reaffirmed in *SCRAP*, that the initial timing of rate changes is entrusted to the Commission even though

ultimately any determination that a rate is or is not just and reasonable is reviewable in the courts. If changes are to be made in this long standing rule which is a central element in the Act, then in the absence of the most exigent circumstances such a change should come from Congress.

II. THE LOWER COURT ERRED IN HOLDING THAT THE COMMISSION'S IMPACT STATEMENT WAS INADEQUATE BECAUSE THE COURT DISAGREED WITH THE COMMISSION'S SUBSTANTIVE DETERMINATIONS.

In this proceeding the ICC prepared an elaborate environmental impact statement of almost 200 pages which manifestly gave searching consideration to the environmental issues allegedly raised by the rate increase and discussed each of the substantive issues specified by NEPA. Accordingly, the agency satisfied its statutory obligation to prepare an impact statement and the lower court was not entitled to set the impact statement aside because it disagreed with the agency's tone or substantive judgments. Alternatively, even if the agency's substantive analysis were open to judicial review, its analysis here was reasoned, informed, and within the permissible bounds of agency expertise, and the lower court exceeded the limits of judicial review in setting it aside or seeking to dictate the outcome of further agency proceedings.

A. The Commission Clearly Gave Environmental Issues the "Hard Look" Required by NEPA.

In imposing the duty on all federal agencies to prepare, in connection with any major federal action significantly affecting the quality of the human environment, a detailed environmental impact statement and to consult with other federal agencies with expertise in the environmental area before making the statement, Congress sought to assure that the decision-

making process within the federal agencies would give consideration to the possible environmental consequences of their proposed actions.[40] NEPA's impact statement procedure was thus designed to assure that the agency would take a careful look at the possible environmental consequences of its action but *not* to dictate the particular result to be reached by the agency.[41] In "requiring all federal agencies to consider values of environmental preservation in their spheres of activity," *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC,* 449 F.2d 1109, 1111 (D.C. Cir. 1971), Congress placed the basic obligation upon the federal agencies to consider and evaluate the environmental consequences of their proposed actions within their areas of operation and expertise.[42]

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[40] *Hearings on S. 1075, S. 237 and S. 1752 Before the U. S. Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. 24-34 (1969).

[41] As the court stated in *Scenic Hudson Preservation Conf.* v. *FPC,* 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied,* 407 U.S. 926 (1972): "the Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency." See also *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (9th Cir. 1973); *Monroe County Conservation Council* v. *Volpe,* 472 F.2d 693 (2d Cir. 1972); *Committee To Stop Route 7* v. *Volpe,* 346 F. Supp. 731 (D. Conn. 1972).

[42] This Court recognized in *SCRAP* itself that the "federal agencies . . . have the primary responsibility for the implementation of NEPA." *United States* v. *SCRAP, supra,* 412 U.S. at 694. Similarly, the Council on Environmental Quality stated in guidelines issued for federal agencies on compliance with NEPA: "The objective of section 102(2)(C) of the Act and of these guidelines is *to build into the agency decision making process* an appropriate and careful consideration of the environmental aspects of the proposed action . . ." 36 Fed. Reg. 7724 (April 23, 1971) (emphasis supplied).

Consonantly, the courts in repeated, well reasoned decisions have recognized that judicial review of impact statements is quite limited.[43] So far as the content of impact statements is concerned, the function of the courts is simply to ensure that the environmental effects of a proposed action are given detailed consideration by the decision-maker. *Cape Henry Bird Club v. Laird,* 359 F. Supp. 404 (W.D. Va.), *aff'd per curiam,* 484 F.2d 453 (4th Cir. 1973). Once "the officials or agencies have taken the 'hard look' at environmental consequences mandated by Congress," a court must not "inject itself within the area of discretion of the executive as to the choice of action to be taken." *National Resources Defense Council* v. *Morton, supra,* 458 F.2d at 838. *City of New York* v. *United States, supra,* 344 F. Supp. at 940 n.17.

Judged in this framework, the impact statement in this case clearly constituted the "detailed statement" required by Section 102(2)(C) on the alleged environmental impact of the proposed action. In 150 pages of analysis, it addressed each of the related topics specified in the statute.[44] The final statement was issued

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[43] See, *e.g., EDF* v. *Corps of Engineers,* 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973); *EDF* v. *Froehlke,* 473 F.2d 346 (8th Cir. 1972); *City of New York* v. *United States,* 344 F. Supp. 929 (E.D.N.Y. 1972) (ICC Impact Statement)); *National Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972); *National Helium Corp.* v. *Morton,* 486 F.2d 995 (10th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

[44] These are whether there would be any unavoidable adverse environmental effects as a result of its action; alternatives to the proposed action; the relationship between local short-term use of man's environment and the maintenance and enhancement of long-term productivity; and the irreversible and irretrievable commitments of resources which would be involved in the proposed action were it implemented.

only after the ICC received and reviewed comments on the draft statement obtained not only from other federal agencies, but also from the public at large including the appellees. See p. 9, above. We submit that even the briefest perusal of the statement refutes any suggestion that it was perfunctory, feigned, or pro forma in its examination.

Instead of evaluating the impact statement in terms of whether the Commission had given detailed consideration to all the factors mandated by NEPA, the standard correctly employed by the dissenting opinion below (371 F. Supp. at 1312 (Gov. J.S. 56a)), the lower court embarked upon an unwarranted, *de novo* consideration of the very questions which NEPA confided to the agency decision-making process. For example, the court objected because the Commission chose to rely on one type of study rather than another. 371 F. Supp. at 1303 (Gov. J.S. 31a-32a).[45] It argued that the impact statement did not specifically respond to one or another of the many different points and studies considered in the voluminous proceeding. *Id.* at 1303 (Gov. J.S. 33a-34a). It asserted inaccurately that the Commission limited itself exclusively to the environmental effects of the rate increase in question and failed to address the alleged underlying discrimination against recyclables in the existing freight rate structure. *Id.* at 1303-04 (Gov. J.S. 34a-35a). These

[45] The court said, for instance, that "the statement does not offer any rigorous price sensitivity studies of its own" but "relies on general discussions of past scrap demand trends" and on "the concurrence of past scrap demand and rate increases." *Id.* And the court indicated its preference for a "study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete." *Id.* at 1306 (Gov. J.S. 41a). These and other criticisms are addressed on their merits at pp. 41-48, below.

attacks are directed at the Commission's consideration and evaluation of particular facts, the inferences the Commission has drawn, and the judgments it has made in the course of its careful examination of the environmental issues raised by its proposed action.

Other criticisms of the court, while phrased in more general terms, similarly comprise nothing more than disagreement with the Commission's substantive determinations. For example, the court complained about the statement's "language and style" as reflecting the Commission's insensitivity to environmental values. It said that the ICC appeared to find no merit in environmental arguments against the rate increase and adopted none of those arguments "as worthy of even partial acceptance." *Id.* at 1302 (Gov. J.S. 29a-30a). And it took the Commission to ask for "failure to alter its draft impact statement" in response to the comments of other agencies and parties to the proceeding having special environmental interests. *Id.* at 1302 (Gov. J.S. 31a). Such assertions show that the District Court has not in any sense confined itself to enforcing "procedural" requirements of NEPA, as the opinion claims, but has thrust itself directly into the substantive decision-making properly confided to the agency.

We do not believe that this Court needs to reach and weigh each of the individual criticisms the lower court made of the impact statement—or our showing below that those criticisms were logically and factually unsound—in order to hold that the impact statement met the requirements of NEPA. Whatever may be the merits of the criticisms, the essential point is that they were not part of the judicial function under NEPA. Under a proper interpretation of the law, an impact statement should be found inadequate only if

the agency has failed to follow the procedures established by NEPA or has failed to provide a detailed statement considering the possible environmental consequences of its action. *Scenic Hudson Preservation Conf.* v. *FPC, supra,* 453 F.2d at 481.

This principle of judicial review is implicit in NEPA's statutory provision requiring impact statements which, as we have shown, was framed to require evidence that the agency had considered environmental consequences and not to dictate the result reached by the agency. See pp. 34-36, above. Nothing in NEPA's language or its legislative history warrants or even suggests the conclusion that Congress intended the federal courts to weigh, balance, re-evaluate or otherwise revise the substance of the agency's determinations. Had Congress intended the courts to play such a role, it would not have failed to make clear its intention in NEPA or its legislative history.

Moreover, there are sound policy reasons for avoiding such judicial intervention. Federal courts have neither the time nor the capacity to function as environmental supervisors for the thousands of federal actions in this country which may affect the environment. Indeed, the very absence of any statutory standards for judicial review and the great variety of actions for which NEPA statements may be required would make it virtually impossible to assure prompt or uniform treatment if the federal courts undertook this supervisory role.[46] The only result of substantive

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[46] NEPA is not, of course, limited to agency actions but includes by its express terms "every recommendation or report on proposals for legislation" and has been held to embrace executive branch actions as diverse as the construction of a jailhouse in New York City and the conduct of military maneuvers and weapons testing.

judicial review would be inconsistent determinations, extensive delay of vital projects and an invitation to judges to use their personal predilections to determine whether agencies or federal departments have "adequately" justified the balance struck between environmental considerations and other important national interests.[47]

Finally, it is notable that the best reasoned decisions of the lower federal courts have, once an impact statement has been prepared, rejected attempts to enmesh the courts in a substantive review of the agency's detailed determinations. These decisions include opinions of Judge Friendly in the Second Circuit,[48] and Judge Doyle of the Tenth Circuit.[49] To be sure, some opinions

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[47] The factor of delay becomes especially important if substantive review is allowed. It is one thing to insist that the agency prepare the detailed impact statement discussing each of the issues specified by NEPA. It is quite another to open up a vista of virtually endless delays while an agency re-writes its impact statement, possibly time and time again, to meet substantive objections the reviewing court may perceive each time the impact statement is brought before it.

[48] *City of New York* v. *United States*, 344 F. Supp. 929 (E.D. N.Y. 1972) (three-judge district court). There, Judge Friendly, after having required that an impact statement be prepared in connection with a railroad abandonment alleged to increase the amount of truck traffic and consequent air pollution (337 F.Supp. 150), was equally firm in refusing to substitute the court's judgment for that of the ICC.

[49] *National Helium Corp.* v. *Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). There, the court specifically rejected the trial court's attempt to evaluate the impact statement's environmental determinations by an "arbitrary and capricious" standard (*id.* at 1002 n.5) and in substance concluded that an impact statement which gave detailed and reasonable attention to the subtopics required by NEPA should be sustained. *Id.* at 1002-03.

—notably two opinions by Judge Wright—take the view that substantive determinations in impact statements are open to review to a greater or lesser degree.[50] However, we believe the opinion below in the present case is itself the best evidence why such review is unwarranted.

If this Court holds that the extensive and thoroughly considered impact statement prepared in this case can be thrown out either on the basis of a court's criticisms of the statement's "language and style" (371 F. Supp. at 1302 (Gov. J.S. 29a)), or, alternatively, on a court's substantive disagreement with the agency's "failure to alter its draft impact statement in response to . . . critical comments" (*id.* at 1302 (Gov. J.S. 31a)), it will have ushered in a new era of judicial intervention in the administrative process which finds no justification in the statute and which flies in the face of the well established policies regarding the appropriate division of functions between courts and agencies.

B. Assuming Arguendo That the Lower Court Was Entitled To Review the Merits of the Commission's Impact Statement, Its Criticisms Are Ill-Founded and Far Exceeded the Permissible Scope of Review.

It is important to appreciate, at the outset, that an across-the-board increase in railroad rates—affecting allegedly competing products as well as recyclables—has a relationship to the environment that is at best speculative, diffuse, and open-ended.[51] There is virtual-

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[50] See the opinion below and *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D. C. Cir. 1971).

[51] Mr. Chief Justice Burger made this clear in his opinion on the railroads' initial stay application in the first *SCRAP* case, where he described the "projected chain of events" which would have to occur in order for the rate increase to produce any environmental

ly no limit to the number of examples, studies, possibilities, and analyses that could be demanded by the lower court; and the more the agency says, the more it can be criticized in one aspect or another for what it has said or for not taking one step more.

Against this background, the criticisms the lower court did make were so unpersuasive as virtually to confirm that the ICC did prepare a reasonable and sufficient impact statement. Even assuming that the lower court was entitled to engage in some degree of substantive review of the Commission's impact statement, the court's criticisms were logically unsound, rested upon inaccurate descriptions of what the Commission said and did, and exceeded even the most generous conception of the proper scope of review of impact statements.

The lower court's initial attack was launched at the "defensive and advocatory language and style" (371 F. Supp. at 1302 (Gov. J.S. 29a)) in which the statement was purportedly written. In fact, the court selected from over 150 pages of analysis a few isolated phrases or comments which seem to have offended its standards of stylistic or linguistic propriety—standards which few judicial decisions including the lower court's own opinion would or should seek to follow.[52] A fair consideration of the impact statement and its

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impact. 409 U.S. at 1217. The main premise in the chain—the alleged existence of discrimination against recyclables in the rate structure—is one of the claims the ICC treated in great detail and squarely rejected.

[52] Neither court nor agency should be obliged to pay feigned respect to arguments that are frivolous or disingenuous. If such arguments are "one-dimensional" or "naive"—as certain of them clearly were in this instance (see, *e.g.*, pp. 10-11, above)—the agency is quite entitled to say so.

contents demonstrates that it consistently sought to maintain a balanced approach to the issues before it.

Despite its own extensive treatment of environmental issues in its prior October 4 report, the ICC acceded to the request of CEQ and EPA and undertook to prepare an environmental impact statement, including both the collection of further information to supplement the record and circulation of a draft impact statement.[53] From the outset of its final statement the Commission recognized the obligations NEPA imposed upon it "to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and the environmental quality restored or enhanced, to the fullest extent practicable," and it undertook to conduct its analysis "[i]n this spirit." 346 I.C.C. at 98 (A. 20). The Commission then undertook an extensive discussion touching upon each of the major claims of environmental harm and a vast array of evidence.[54]

Moreover, assuming that there was some basis for criticizing the statement's language or style, this is clearly not the type of consideration which falls within the cognizance of a reviewing court, however broad one may reasonably contend such review should be in

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[53] The October 4 report contained a reasoned explanation of the ICC's conclusion that the rate increases did not have a significant impact on the environment; and accordingly, the ICC was not obliged to prepare an impact statement at all. See, *e.g.*, *Citizens for Reid State Park* v. *Laird*, 336 F. Supp. 783 (D. Me. 1972).

[54] For the future, the Commission looked to the possible design of incentive rates to facilitate the movement of recyclables (346 I.C.C. at 223 (A. 145)), a clear indication of the Commission's continuing concern with environmental considerations; and it made clear its intent to give further attention to discrimination charges and other environmental claims in *Ex Parte No. 270*.

regard to impact statements. It hardly needs to be pointed out that there is no statutory authority or judicial precedent justifying a federal court in acting as a literary review board for federal agencies. To sanction such a judicial role would merely lead to disruption of the administrative process by encouraging agencies to conceal or misstate their actual views.

The lower court's second line of attack on the Commission's impact statement relates to the Commission's "failure to alter its draft impact statement" (371 F. Supp. at 1302 (Gov. J.S. 31a)) in response to the comments of interested parties and agencies, in general, and in response to four comments in particular. However, the contentions to which the court referred are simply particular arguments that the rate changes will adversely affect the environment or demands for still further studies or analyses. Since the Commission believed that the record amply showed that there would be no impact, the lower court's criticism is merely a roundabout way of saying that the Commission was required to alter the result it reached after a full consideration of the environmental facts and issues before it.

Even under the most expansive standards of judicial review, the agency's determinations cannot be rejected at large and in the abstract. The Commission's determinations here rested upon a reasoned analysis of the evidence and contentions and fell well within the bounds of permissible agency discretion. If one examines the specific objections raised by the court to the Commission's analysis, it becomes apparent that they are without basis.

The lower court expressed concern over the alleged failure of the Commission to "offer any price sensi-

tivity studies of its own" (371 F. Supp. at 1303 (Gov. J.S. 31a)), in light of the recommendation of two Government agencies that "a quantitative and thorough economic study be made on the responsiveness of the demand for secondary materials to changes in transportation costs." 371 F. Supp. at 1302 (Gov. J.S. 31a). But in fact, the Commission did consider extensive evidence bearing on responsiveness,[55] and it expressly stated its conclusions with respect to individual recyclables.[56] It did not undertake the particular type of study suggested because in its expert judgment other evidence showed that price and volume of usage did not vary significantly in proportion to freight rate changes of the type and magnitude here involved and thus the "artificial and theoretical" study of the kind urged upon it by the court was totally unnecessary. 346 I.C.C. at 138 n.16 (A. 60). This is the type of expert judgment that lies peculiarly within the discretion

[55] This evidence included statistics relating to increased rail movement of recyclables and actual experience of the railroads in handling recyclables during the 2.5 percent surcharge and before and after earlier increases (*e.g.*, 346 I.C.C. at 141, 147, 171-72, 180, 184-85, 198, 270-71 (A. 63, 69, 93-94, 102, 106-07, 120, 192-93)); consideration of the pricing and demand patterns of recyclables (*e.g.*, *id.* at 126, 167-69, 207 (A. 48, 89-91, 129)); the technological constraints on demand for them and non-price legal or practical limitations on use of recyclables (*e.g.*, *id.* at 147, 150, 165-66, 170-71, 178-79, 182, 185, 186, 202-03 (A. 69, 72, 87-88, 92-93, 100-01, 104, 107, 108, 124-25)); and the limited size of the increases here contrasted with equal or larger increases on alleged competing raw materials (*e.g.*, *id.* at 159, 194, 198 (A. 81, 116, 120)).

[56] See, *e.g.*, 346 I.C.C. at 175 (A. 97) (increased freight rates will not affect movement of paper scrap); *id.* at 182 (A. 104) (rail rates of quite limited importance to textile scrap); *id.* at 187 (A. 109) (freight rate increase on scrap glass could affect only a fraction of market at most); *id.* at 209 (A. 131) (railroad freight rates of minimal importance in recycling plastics); *id.* at 198 (A. 120) (rate increase wll have no effect on recycling of nonferrous scrap metal).

of the agency responsible for preparing an impact statement.[57]

The court also took the Commission to task for failure to provide a "comprehensive alternative analysis of the relative cost contribution of secondary and primary materials." 371 F. Supp. at 1303 (Gov. J.S. 33a). But the court itself recognized that such a study would be relevant only "*if* the transportation costs do affect the demand for recyclable commodities." *Id.* (emphasis supplied). Since the Commission concluded on the basis of its considered evaluation of the evidence that rate changes of the present size do not significantly affect the demand for recyclables, there was clearly no reason for the Commission to undertake such a study. In any event, the Commission did, indeed, consider claims that recyclables were contributing excessively to the railroads' revenue needs and discovered that, from the standpoint of cost contribution, the evidence indicated the contrary.[58]

The lower court's third specific criticism leveled at the Commission's impact statement has no more merit than the first two. The court chided the Commission for "failing to consider the impact of the rate increase on long term investment in facilities which can make

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[57] Claims that rail rate increases will cause diversion or discontinuance of traffic are, of course, virtually a staple contention in ICC rate proceedings, and the Commission has been evaluating such claims with respect to recyclable and nonrecyclable commodities for decades. See p. 57, n.69, below.

[58] For example, sample evidence showed, as earlier noted, that the profit on carriage of iron and steel scrap was less than that on iron ore even though the costs on the latter were generally lower. See p. 11, above. Rates on textile wastes in certain instances did not even cover the railroads' costs (346 I.C.C. at 182 (A. 104)). Incentive or volume rates existed for certain recyclables (*id.* at 170, 196 (A. 92, 118)).

fuller productive use of recyclables." 371 F. Supp. at 1303 (Gov. J.S. 33a). But it is difficult to see what relevance such an inquiry would have when the evidence is overwhelming that the freight rate increases on recyclables here in question have no significant impact on their demand. To be sure, the court time and again reiterates its strenuous disagreement with the Commission's evidentiary conclusion, but the Commission's judgment on that issue was supported by detailed reasoning and extensive evidence. See p. 45, nn.55 & 56, above.

The lower court's final objection to the Commission's impact statement, which it characterized as the "most fundamental and important deficiency" (371 F. Supp. at 1303-04 (Gov. J.S. 34a)), was the alleged limitation of the Commission's analysis "to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment." *Id.* But the court's criticism ignores both what the Commission actually did as well as what it was obliged to do under NEPA. First, it was entirely proper for the Commission to devote principal attention to the particular federal "action" under consideration—which involved the general increases on recyclables—since this focus is what NEPA's language clearly contemplates. Second, the Commission did in fact consider the overall rate structure both in evaluating the cumulative impact of the particular rate change here involved together with prior rate changes,[59] and in discussing charges that

[59] The Commission in fact expressly stated, in concluding that the increases here at issue would not deter recycling, that "we have explored . . . the cumulative effects that past freight rate increases and the proposed increases have had and are likely to have . . . ." 346 I.C.C. at 134 n.15 (A. 56).

the freight rate structure discriminated against recyclables.[60] Finally, in considering the attention due to this broader subject, the Commission properly referred to its broad proceeding in *Ex Parte No. 270* which is currently considering various aspects of the railroad freight rate structure including its relationship to environmental interests. *American Lines* v. *Louisville & N.R.R.*, 392 U.S. 571, 590-91 (1968).

In summary, the lower court's criticisms of the Commission's impact statement are fatally defective on two counts: they represent an unwarranted substitution of the judgment of a court for that of the agency on matters properly within its province, such as the phrasing of its report, its choice of analyses, and its evaluation of evidence, an approach that clearly violates even the most generous conception of the scope of judicial review of impact statements; in addition, the criticisms themselves are ill-founded—based on a misconception of what the Commission actually did or was required to do under NEPA. If the present impact statement does not meet the requirements of NEPA, it is difficult to believe that any impact statement could ever do so.

C. Assuming Arguendo That the District Court Had Some Basis for Overturning the Commission's Impact Statement, the Terms of Its Remand Exceeded Its Authority.

Finally, even if the lower court did have some basis for overturning the ICC's impact statement, it certainly was not entitled to prescribe and dictate how the ICC should handle the case on remand. The deci-

[60] The Commission's analysis indicated that, on the contrary, it is nonrecyclables which are bearing a heavier share of the costs. See p. 11, above.

sion patently usurps the agency's function by its detailed directions to the ICC specifying what arguments, evidence or procedures may or may not be utilized in the remanded proceeding.

Thus, the court instructed the agency what types of analyses and studies it must make and include in its new impact statement (371 F. Supp. at 1302-03, 1306 (Gov. J.S. 31a-34a)); it told it what kind of arguments it may not ignore (*id.* at 1303-04 (Gov. J.S. 34a-36a)); it determined the scope of the study including a direction to study in depth the underlying rate structure (*id.* at 1304-05 (Gov. J.S. 36a)); and it prescribed procedural steps that find no support whatever in NEPA itself (*id.* at 1306-07 (Gov. J.S. 39a-43a)). See also pp. 51-56, below. Indeed, the court's opinion in effect advised the ICC that it must reach a different result in the remanded proceeding. For example, it condemned the impact statement because it did not adopt at least some of the environmental arguments (371 F. Supp. at 1302 (Gov. J.S. 31a)) and some of the specific agency criticisms (*id.* at 1302-04 (Gov. J.S. 31a-34a)). See also pp. 41-48, above.

The lower court's action in this regard not only confirms that it has substituted its own substantive views for those of the agency but represents independent legal error. It has long been settled that the courts will not direct an administrative agency how to exercise the discretion reposed in it by Congress or dictate the content of the decision that the agency may make in the exercise of that discretion.[61] On judicial

[61] *United States ex rel. Chicago, G.W. R.R. v. ICC*, 294 U.S. 50, 60 (1935); *ICC* v. *United States ex rel. Waste Merchants Ass'n*, 260 U.S. 32, 34 (1922); *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 752 (D. Del. 1961).

review the court's function is simply to lay bare any legal error committed by the agency (*FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)), and it is improper for the reviewing court to impose in its remand limitations on the way in which the agency shall exercise its judgment. *Id.*; *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965).

It is worth noting that the remanded proceeding as conceived by the lower court appears to require studies so numerous, extensive and detailed that it is doubtful that it could be accomplished without years of work and vast expenditures of time and money. However that may be, it is not the lower court's function to decide this question. If, contrary to the railroads' prior argument, this Court does hold the lower court properly reviewed the substance of the impact statement and correctly found it deficient, nevertheless the lower court's attempt to control the course of future proceedings should be set aside.

III. THE COMMISSION DID NOT COMMIT PROCEDURAL ERROR IN PREPARING ITS IMPACT STATEMENT.

Although most of the lower court's criticisms of the Commission's impact statement represented substantive disagreements with the Commission's conclusions, the court also contended that the Commission committed two procedural errors in the course of its preparation of the impact statement. The court asserted that the Commission erred both in failing "to start over again" to reconsider its approval of the rate increases on recyclables after evaluating the alleged environmental impact of such increases (371 F. Supp. at 1299-1300 (Gov. J.S. 23a-26a)), and in failing to issue an impact statement prior to a "hearing." 371 F. Supp. at 1300 (Gov. J.S. 25a-26a). Neither criticism is justi-

fied and further proceedings would serve no useful purpose.

A. The Court's Complaint That the Commission Failed to "Start Over Again" Is Irrational.

The principal criticism made by the court of the procedures the Commission followed in the preparation of its impact statement was that the Commission, in undertaking its comprehensive study, did not "start over again" but instead "merely reopened *Ex Parte No. 281* 'for the limited purpose of further evaluating . . . the environmental effects of increased railroad freight rates and charges' on the movement of recyclable commodities," through the impact statement procedure. 371 F. Supp. at 1299 (Gov. J.S. 23a). The opinion asserts that "the Commission thus indicated that it had already made its decision and all that remained was to determine if the environmental effects of that decision could be justified." *Id.*

The thrust of the lower court's argument seems to be that, in failing to reconsider its October 4 report, the Commission made "no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement." *Id.* at 1299 (Gov. J.S. 23a). In light of the fact that the Commission determined, after a thorough investigation including preparation of an impact statement, that the increases on recyclables would have *no* significant adverse impact on the environment, the lower court's suggestion that the Commission should nevertheless have started the entire proceeding over again makes no sense. The impact statement reached the same conclusion on environmental effects that had been reached

by the October 4 report and that had served as a premise for its determinations. Since the premise was confirmed, obviously there was no basis for altering the conclusions reached earlier.[62]

If the Commission had concluded that the increases in rates on recyclables in question would have a significant adverse impact on the environment, it might reasonably follow that the October 4 decision would have to be reopened. In those circumstances, the Commission might have had in some sense to "start over" and weigh the environmental impact against the railroads' need for revenue, the burden of making other shippers bear costs attributable to recyclables, and similar considerations. That, however, is not this case.

There is nothing in NEPA or the case law interpreting it to suggest that when an agency concludes that its action will have no environmental impact it must nevertheless rewrite its administrative decision over again to ensure full consideration of this datum. Nor is there any sound reason in policy for such an empty gesture. It is impossible to discern how any prejudice could possibly have resulted from the Commission's action.

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[62] This seems so plain that it is difficult to conceive what the lower court meant in complaining that the Commission's order of May 7, 1973, adopting the impact statement and discontinuing the proceeding "is further evidence that the Commission neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase. That one-sentence order merely adopts the entire staff-prepared impact statement." 371 F. Supp. at 1299 (Gov. J.S. 23a)). The Commission clearly said everything it had to say about environmental issues in the impact statement and, in light of its conclusion, nothing else had to be said to alter its earlier conclusions on other issues.

B. NEPA Does Not Require That An Agency Issue Its Impact Statement Before the First Decision-Making Stage in the Agency Process.

In addition to its criticism of the Commission for failing to "start over again," the lower court relied on the ICC's failure to issue an impact statement prior to a "hearing" as a subsidiary "procedural" ground for invalidating the impact statement. 371 F. Supp. at 1300 (Gov. J.S. 25a). And it directed the ICC on remand to publish its impact statement prior to a "hearing" as well as prior to its ultimate decision. *Id.* at 1306-07 (Gov. J.S. 41a-42a). The District Court thus determined that an impact statement must be prepared not only prior to the agency's *decision* in a general revenue proceeding but also prior to its reception of evidence in the course of such a proceeding.

The lower court's decision misconceives both the nature of a general revenue proceeding and the requirements of NEPA. General revenue proceedings are largely conducted through written testimony and all evidence is furnished directly to the full Commission itself. No tentative or recommended decision is made by an examiner or board at any intermediate stage: the ICC makes its own decision based upon the compiled evidence, briefs and oral argument.

Under the express language of NEPA the only environmental impact statement required is one that is to be "include[d]" in or with the agency's recommendation or report. Section 102(2)(C). Since the same section provides that the impact statement shall "accompany" the proposal through the "agency review processes," it has been argued that the impact statement must be prepared at the first decision-making stage where two or more decisions are involved, so that it may inform that initial decision and be con-

the ICC's basic task of assuring a sound and efficient rail transportation system in the United States.[67]

C. Further Proceedings, Requiring the Commission To Review for the Third Time the Environmental Effects of Ex Parte No. 281 Increases on Recyclables, Would Be a Pointless Act.

The railroads, for the reasons stated above, believe that the Commission's procedures in this case fully accord with the requirements of NEPA. Even assuming, however, that there was some technical infirmity in the course of the proceedings, the impact statement should be sustained. All parties have had ample opportunity to introduce evidence, the Commission has considered the environmental impact of the rate increases here involved in *two* extensive reports, and there is no reasonable likelihood that further proceedings would produce a different result.

Both the environmentalists and the industry groups interested in recyclables had a full opportunity at the outset of this proceeding to introduce all relevant evidence to show that the rate increases would adversely affect the environment. In fact, a large number of protests, verified statements, rebuttal or reply statements, and similar documents were introduced covering environmental as well as other issues.[68] Comments, protests, or verified statements were introduced, among others, by SCRAP, NASMI, and EDF. When the

[67] The observation made in Mr. Justice White's separate opinion in *SCRAP* bears repeating in this context. The "failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.

[68] The railroads alone introduced over 50 verified evidentiary statements and over 100 reply verified statements, including a number directed to recyclables or environmental issues which are contained in the Appendix (A. 421-565).

Commission re-opened the proceeding in November 1973, it invited the parties to supplement its own bibliography of environmental information, and after publishing the draft environmental impact statement, invited further comments from all interested parties.

Similarly, the Commission itself has explored the evidence in depth twice—first in its October 4 report and second in preparing its draft and final environmental impact statements. The main environmental arguments, involving claims that the rate increases would discourage the movement of recyclables, are ones which the Commission has heard many times in the past and fall within its field of expertise.[69] It is fanciful to suppose that yet a third study of precisely the same environmental claims directed at precisely the same rate increases would produce a different result in the Commission's environmental assessment, let alone a determination that different rate levels should be adopted.[70]

It is well established that even if an agency has committed a substantive or procedural error, the error

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[69] See, *e.g.*, *Ex Parte No. 256*, 332 I.C.C. 280, 329 (1968); *Ex Parte Nos. 265/267*, 339 I.C.C. 125, 206-07 (1971); *Institute of Scrap Iron & Steel* v. *Akron, C. & Y. R.R.*, 316 I.C.C. 55 (1962).

[70] Even a determination that the increases would have an adverse impact on the environment by discouraging the movement of recyclables would not, of course, require the Commission to decide that the increases should be limited or disallowed. Against any such impact would have to be weighed the needs of the railroads for adequate revenues, the adverse environmental effects of denying the railroads revenues for their own environmental programs, the impact of deteriorating railroad service on the movement of recyclables, and similar factors. The Commission's impact statement has already made clear that even if it had found some adverse effect on the environment, it would have sustained the increases here involved in light of countervailing considerations. 346 I.C.C. at 217 (A. 139).

should be deemed harmless and the agency's decision sustained unless there is some reasonable likelihood that the error has affected the outcome and that further proceedings might reasonably be expected to produce a different result. As this Court recently stated in language fully applicable here:

> "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game. . . . There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand."[71]

Judge Flannery put the matter correctly in this case when he stated that "based on the substantial record already compiled, to remand for further hearings under N.E.P.A. would require the Commission to conduct a largely ritualistic act." 371 F. Supp. at 1312 (Gov. J.S. 54a-55a).

If the proponents of an exemption of recyclables from rate increases do have evidence or arguments to advance, they will have ample opportunity to do so in *Ex Parte No. 270,* in complaint proceedings addressed to particular recyclable rates, or in subsequent general revenue cases. It would serve no purpose to further prolong the present administrative proceeding which—beginning as an emergency proceeding in response to the railroads' financial plight—is now approaching its third anniversary. As Mr. Chief Justice Burger stated in this litigation several years ago, it is important to be alert to the needs of our environment but "the world must go on and new environ-

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[71] *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). See also *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 67 (1961); *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248 (1964); 28 U.S.C. § 2111.

mental legislation must be carefully meshed with more traditional patterns of federal regulation." 409 U.S. at 1218.

CONCLUSION

For the reasons stated, the District Court's decision should be reversed.

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December 1974